

Professional Obligation and the Duty to Rescue: When Must a Psychiatrist Protect His Patient's Intended Victim?

Three state court decisions¹ have held that psychiatrists² must warn potential victims of the violence threatened by their patients.³ These decisions have created a new exception to the long-standing general rule, based on respect for individual liberty, that an individual is not required to take affirmative steps to rescue others from danger. These state court decisions justified overriding the liberty principle by extending the "special relationships" rationale for affirmative duties to the psychiatrist-patient relationship, and by the policy argument that imposing such a duty

1. *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976); *McIntosh v. Milano*, 168 N.J. Super. 466, 403 A.2d 500 (1979); *Mavroudis v. Superior Court*, 102 Cal. App. 3d 594, 162 Cal. Rptr. 724 (1981).

The *Tarasoff* case evolved as follows: In August 1969, Prosenjit Poddar was a voluntary psychiatric outpatient receiving therapy at the University of California's Cowell Memorial Hospital. He told his therapist, Dr. Lawrence Moore, of his plan to kill a young woman named Tatiana Tarasoff when she returned home from summer vacation. Dr. Moore orally notified campus police and later sent a letter requesting their assistance in detaining Poddar. The police took Poddar into custody but soon released him, after somehow satisfying themselves that he would stay away from his intended victim. No subsequent attempt was made to commit Poddar, who had broken all connections with the hospital and had ended therapy after the incident with the campus police. On October 27, 1969, Poddar murdered Tatiana Tarasoff. The California Supreme Court held that a complaint against the defendant therapists, asserting that they had determined that the daughter's killer presented a danger of violence to her, or should have so determined, but nonetheless failed to exercise reasonable care to protect her from that danger, stated a cause of action upon which relief could be granted.

In *McIntosh v. Milano*, Dr. Michael Milano, a licensed psychiatrist, treated Lee Morgenstein. During weekly sessions over a period of two years, Morgenstein related fantasies that included the use of a knife to threaten people. Morgenstein also told Milano that he had bought and carried a knife to scare away threatening people and in fact showed the knife to Milano. Further, Morgenstein described a sexual relationship with Kimberly McIntosh, and Milano knew that Morgenstein had fired a BB gun at a car belonging to either Miss McIntosh or her boyfriend in anger over her seeing other men.

In July 1975, Morgenstein stole a blank prescription from Dr. Milano's desk and tried to purchase thirty Seconal tablets at a pharmacy. The pharmacist was suspicious and called Milano, who told the pharmacist not to fill the prescription and to send Morgenstein home. Morgenstein returned home to get a handgun, and went to the McIntosh house where he intercepted Kimberly on her way home. He took her to a park where he shot her in the back.

Robert Mavroudis attacked his parents with a hammer, causing multiple injuries. *Mavroudis v. Superior Court*, 102 Cal. App. 3d 594, 162 Cal. Rptr. 724 (1981). His parents sued several parties (Kaiser Foundation Hospitals, Mayor's Help Hospital, Redwood House, and County of San Mateo) who had treated Robert for mental disorders on the theory that those parties knew or reasonably should have known that Robert posed a danger to them.

2. In this Note, the terms "psychotherapist," "therapist," and "psychiatrist" are used interchangeably. The difference among the terms (for example, a psychiatrist is an M.D.) is not material to the arguments.

3. The only other reported case ruling on this legal question, *Shaw v. Glickman*, 45 Md. App. 718, 415 A.2d 625 (1980), neither accepted nor rejected the extension of liability because it ruled that, as a factual matter, the patient never threatened the plaintiff.

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on psychiatrists promotes public safety.

This Note examines the reasoning used in these decisions to support expansion of the warning requirement, and concludes that these courts have failed to provide a principled justification for departing from the law's general refusal to require rescue. The Note reformulates the duty by developing an alternative theory of liability, "the principle of professional obligation." This principle would require a person who enters an occupation in which he reasonably can expect to have an increased chance of finding a helpless or endangered person to take affirmative steps to protect such a person. The Note marshals common-law analogies and the jurisprudence of Ronald Dworkin⁴ to advance this principle as law. The Note concludes by proposing a standard to trigger the psychiatrist's duty, and by indicating how a psychiatrist would discharge this duty.

I. The Need for Principled Justification for the Psychiatrist's Duty to Rescue

In the absence of principled justification, judicial decisions lack legitimacy. A brief review of the nature of a principled justification, and of the principles underlying the law's general rule refusing to require rescue, clarifies the reasoning that would justify exceptions to the general rule. Examination of the cases imposing a duty to warn on psychiatrists demonstrates that these cases have failed to employ such reasoning.

A. *The Nature of Principled Justifications*

The jurisprudence of Ronald Dworkin rejects the positivist contention that "law" consists only of the "rules" of the black-letter sort found in textbooks and enunciated as holdings in particular cases. Law also includes a system of principles, underlying standards of justice, fairness, and morality. A principle is "law" if it is part of the soundest theory that coherently justifies the explicit rules of a given jurisdiction.⁵

Dworkin also rejects the utilitarian contention that judicial decisions

4. See R. DWORKIN, TAKING RIGHTS SERIOUSLY 15-130 (1978); Dworkin, *No Right Answer?* 53 N.Y.U. L. REV. 1 (1978).

5. Courts find legal validity not simply in the existence of a rule, but in the relationship between the propositions advanced in a particular case and the larger system of principles from which legal arguments are drawn. Rules are part of that system, but they are binding only when the system of principles supplies grounds for applying them, and that system may prescribe answers when no prior rule applies. See Dworkin, *supra* note 4, at 1. Implicit in the role of principles in judicial reasoning is that they become relevant to a case because they are derived from a coherent and tenable "political theory," a system marked by the interdependency of its propositions. See R. DWORKIN, *supra* note 4, at 86-88, 101-23. Given this interdependency, anomaly provides the occasion to change or eliminate a rule. Cf. T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 52-65 (1970) (anomaly will be excised or paradigm replaced).

should be based on policy considerations.⁶ In contrast to arguments of principle, which aim to establish individual rights, arguments of policy are intended to advance or secure collective goals that may be economic, political, or social.

Judicial decisions characteristically are, and should be, generated by arguments of principle, not policy.⁷ First, under our system of government, judges are insulated from the demands of the political majority. As Alexander Bickel has observed, judges are therefore better qualified to evaluate arguments of principle than arguments of policy, since the latter attempt to balance competing goals in the effort to improve the welfare of the overall community. A legislature composed of elected representatives is better equipped to assess such policy arguments.⁸

Second, equal distribution of rights is deeply engrained in our conceptions of justice.⁹ In order to treat each person equally, a judge must employ arguments that justify entitlements coherently; that is, he must reason through principles.¹⁰ Policies, on the other hand, are aggregative. Treating individuals alike need not be part of a responsible strategy for reaching an aggregate goal. That is, legislatures but not courts can choose to regulate one harm but not others on the basis of policy considerations.¹¹ Respect for the genius of the structure of our government and for equality of rights, forbids a judge from considering majoritarian policies in deciding a case.

Finally, principles have a dimension that rules do not—the dimension of weight or importance.¹² When principles conflict, legal reasoning serves to resolve the conflict by examining analogous cases to determine which

6. Wealth-maximization theory shares the faith in policy analysis with utilitarianism, though wealth-maximization would assess the policy implications of a proposed rule by different criteria. Posner, *Utilitarianism, Economics and Legal Theory*, 8 J. LEGAL STUD. 103 (1979). *But cf.* Kronman, *Wealth-Maximization as a Normative Principle*, 9 J. LEGAL STUD. 227 (1980) (wealth maximization has none of virtues and all of vices of utilitarianism); Dworkin, *Is Wealth a Value?* 9 J. LEGAL STUD. 191 (1980) (social wealth is neither component nor instrument of value).

7. R. DWORKIN, *supra* note 4, at 81-105.

8. See R. DWORKIN, *supra* note 4, at 84-86; A. BICKEL, *THE LEAST DANGEROUS BRANCH* 23-28 (1962).

9. See R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 28-35 (1974); J. RAWLS, *A THEORY OF JUSTICE* 60 (1971).

10. This jurisprudence not only rejects the validity of judicial use of policy argument, but also rejects the positivist contention that, when no explicit rule governs, a judge may decide a rule from his own personal preferences. In order to respect individual rights equally, judges must employ principled arguments. See R. DWORKIN, *supra* note 4, at 22-39.

11. Another objection to policy arguments applies with considerably less force to principled arguments. Policy decisions are not rooted in existing law; when courts apply policy to cases in which no explicit rule governs, the law operates retroactively. By emphasizing principles, the judge employs justifications that already are embedded in the law even when he establishes new, explicit rules. Because principles coherently explain analogous cases, the plaintiff has a right to a particular decision. See R. DWORKIN, *supra* note 4, at 84-86.

12. *Id.* at 26.

principles have proven weightier than others.¹³ Ad hoc and expedient policy balancing, in contrast, is an unsatisfactory mode of analysis that leaves too much to the personal preferences of judges,¹⁴ and permits inconsistency.

B. *The General Refusal to Require Rescue*

Two principles traditionally embraced by the common law, the liberty principle and the Good Samaritan principle, are relevant to the creation of a psychiatrist's duty to warn. The law's general refusal to require rescue reflects the central importance of liberty as a principle in tort law.¹⁵ A major task of the legal system is to define the boundaries of individual liberty.¹⁶ Respect for liberty requires recognizing that by making a broad choice a person can bind himself to certain future requirements. Some of those requirements are explicit; others exist when certain factual conditions or emergencies arise as part of the general undertaking even though the person may not have agreed to or thought about them explicitly. In contract, for instance, a seaman is expected to make extra efforts in the event that fellow seamen desert; he is deemed compensated for the risk of such emergencies by his original contract.¹⁷ In tort, once one chooses to drive a car, for instance, he must exercise reasonable care to avoid hitting pedestrians.¹⁸

Whether the law should require affirmative duties of rescue, and under what circumstances, is an enduring area of debate. In the rescue context, the principle of liberty conflicts with the "Good Samaritan" moral obligation to assist others.¹⁹ The Good Samaritan principle is subservient to the liberty principle and thus generally has not created legal duties. Otherwise, requiring a person to act affirmatively for the benefit of another would make him, in effect, the "uncompensated servant of another."²⁰ To

13. *Id.* at 26-28.

14. *Id.* at 31-39.

15. See Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972). Cf. J. RAWLS, *A THEORY OF JUSTICE* 60 (1971) (first principle of justice is that individuals have equal right to most extensive liberty compatible with similar liberty for others).

16. See Epstein, *supra* note 15, at 203.

17. See *Stilk v. Myrick*, 2 Camp. 317 (1809).

18. See Weinrib, *The Case For a Duty to Rescue*, 90 YALE L.J. 247, 252 (1980); Linden, *Torts—Nonfeasance—Rescue and Foreseeability*, 48 CAN. B. REV. 541, 542 (1970). Some jurisdictions, notably Vermont, have passed statutes to give legal effect to the Good Samaritan principle. VT. STAT. ANN. tit. 12, § 519 (Supp. 1971). See Franklin, *Vermont Requires Rescue: A Comment*, 25 STAN. L. REV. 51 (1972).

19. For examples of the judicial use of Good Samaritan arguments to create affirmative duties, see *Farwell v. Keaton*, 396 Mich. 281, 240 N.W.2d 217 (1976); *Hunnicke v. Meramec Quarry Co.*, 262 Mo. 560, 172 S.W. 43 (1914).

20. See Hale, *Prima Facie Torts, Combination, and Non-feasance*, 46 COLUM. L. REV. 196, 214 (1946). While the principal intellectual foundations of this position are Kantian, some utilitarian

require a person to rescue others would deprive him of the right to choose how to use his labor, and the right to compensation for his labor and risk. The law generally has protected these liberties by upholding freedom of contract values; a victim cannot conscript a rescuer's services, but must purchase them under the usual contractual mechanisms.²¹

Coupled with the liberty argument against affirmative duties is an argument that "once one decides that as a matter of statutory or common law duty, an individual is required under some circumstances to act at his own cost for the exclusive benefit of another, then it is very hard to set out in a principled manner the limits of social interference . . ."²² This particular slippery slope leads in at least two directions. First, once a duty is imposed in one set of circumstances, it is difficult to delimit the duty short of imposing it in a large number of circumstances that may be difficult to distinguish successfully, including a legal requirement for large-scale wealth distribution.²³ Second, within any particular rescue situation, more than one potential rescuer might be available; consistency seems to dictate that if one of those potential rescuers is liable, then all should be.²⁴

Respect for the liberty principle and recognition of the difficulty of setting principled limits to affirmative duties have proven formidable obstacles to establishing such duties. The swimmer who sees another drowning before his eyes, for example, is not required to do anything about it and may watch the person drown.²⁵ Similarly, the law does not require anyone to bind up the wounds of a stranger bleeding to death,²⁶ to prevent a

theorists also have concluded that liberty supersedes a duty to rescue others. For Kant, to require one person to come to the rescue of another would be to direct the will of the rescuer by the will of the victim, violating the universal law of freedom. I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 0 (J. Ladd trans. 1965). The chief utilitarian adherent of this position was William Godwin. See I. W. GODWIN, *ENQUIRY CONCERNING POLITICAL JUSTICE AND ITS INFLUENCE ON GENERAL VIRTUE AND HAPPINESS* 165-327 (I. Krammick ed. 1976). Godwin argued that individuals should respect each person's right to private judgment, a right that is essential for the development of the person's moral capacities. The function of government is to ensure that the exercise of each individual's private judgment does not intrude upon his neighbor's equal right to private judgment. *Id.* at 198, 234. The government may legitimately prevent one person from harassing another, because harm impairs the exercise of private judgment; it may not, however, legitimately force one person to benefit another, even though that might be morally required, because such coercion would violate the right to private judgment.

21. See Weinrib, *supra* note 18, at 276. See generally M. FRIEDMAN, *CAPITALISM AND FREEDOM* 7-21 (1962) (economic freedom has intrinsic value, and is indispensable to political freedom).

22. Epstein, *supra* note 15, at 198. Kant saw no distinction between the moral duty to effect an easy rescue in an emergency and the moral duty to help the needy. I. KANT, *THE METAPHYSICAL PRINCIPLES OF VIRTUE* 49 (M. Gregor trans. 1964).

23. See Weinrib, *supra* note 18, at 272.

24. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 341 (4th ed. 1971). Prosser characterized this as "the difficulties of setting any standards of unselfish service to fellow men, and of making any workable rule to cover possible situations where fifty people might fail to rescue one. . . ."

25. *Handiboe v. McCarthy*, 114 Ga. App. 541, 151 S.E.2d 905 (1966); *Yania v. Bigan*, 397 Pa. 316, 155 A.2d 343 (1959).

26. *Riley v. Gulf, C. & S.F. Ry. Co.*, 160 S.W. 595 (Tex. Civ. App. 1913).

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neighbor's child from hammering a dangerous explosive,²⁷ to prevent a train from blocking a fire engine on its way to a fire.²⁸

The legal principles that allow a person to stand by and to observe another perish have long plagued judges and scholars with chronic moral discomfort.²⁹ In certain unusual circumstances the law has carved out exceptions that overcome application of the liberty principle and yield to the Good Samaritan principle of rescue.³⁰ In these situations, potential rescuers have been held accountable for failure to rescue because of a "special relationship" with the victim.

As commentators have noted, many of these "special relationships" exceptions respond in a principled way to the problem of the uncompensated servant, thus obviating the typical requirement of a contract to rescue.³¹ One well-established and principled category consists of business relationships,³² such as shopkeeper-business visitor,³³ inn-keeper-guest,³⁴ and carrier-passenger.³⁵ For instance, a carrier is required to rescue a passenger who, at no fault of the carrier, has fallen off the train.³⁶ In these situations, the law has deemed the defendant's liberty sufficiently protected because he (1) has made the general choice of how to employ his labor by voluntarily entering a line of business, (2) can reasonably foresee that other people will need particular forms of affirmative protection associated with the running of that business, and (3) can adjust his compensation to cover the potential costs of providing protection in ways that are unavailable to the uncompensated servant.³⁷ The law in these circumstances has found that liberty values are sufficiently preserved to allow the Good Samaritan principle to prevail.

27. *Sidwell v. McVay*, 282 P.2d 756 (Okla. 1955).

28. *Louisville & Nashville R. Co. v. Scruggs & Echols*, 161 Ala. 97, 49 So. 399 (1909).

29. Prosser has characterized these exceptions as "revolting to any moral sense." W. PROSSER, *supra* note 24, at 341.

30. For a summary of these exceptions, see *id.* at 341-46; Weinrib, *supra* note 18, at 270-72.

31. One of these is family duties. The common law has traditionally held that family agreements are outside the realm of contracts. See *Balfour v. Balfour*, [1919] 2 K.B. 571, 579 (C.A.). Moreover, statutory requirements that certain family members supply necessities of life to those within their charge are common. See *Sommers v. Putnam Bd. of Educ.*, 113 Ohio 177, 148 N.E. 682 (1925); Weinrib, *supra* note 18, at 271.

32. See Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217, 230 (1908); McNiece & Thornton, *Affirmative Duties in Tort*, 58 YALE L.J. 1272 (1949).

33. *Harold's Club v. Sanchez*, 70 Nev. 518, 275 P.2d 384 (1954).

34. *Dove v. Lowden*, 47 F. Supp. 546 (W.D. Missouri 1942).

35. *Yu v. New York, N.H. & H.R. Co.*, 145 Conn. 451, 144 A.2d 56 (1958).

36. *Yazoo & M.V.R. Co. v. Byrd*, 89 Miss. 308, 42 So. 286 (1906).

37. In a seminal article on the law on affirmative duty, Francis Bohlen identified these factors as "volition" and "reward." Bohlen, *supra* note 32, at 217, 229-31. Professor Bohlen's formulation, while helpful, is imprecise. It is clear from Bohlen's examples that by "volition" he means the process of making a general choice of entering an occupation or line of business, and by "reward" he means a payment analogous to that received under a contract, not other conceivable rewards (such as emotional gratification). *Id.* at 227-31.

For many other "special relationships," discovering a principled basis for the duty to rescue is much more problematical. Often these "principles" seem to reflect nothing more than the idiosyncratic moral intuitions of particular judges.³⁸

C. *The Psychiatrist's Duty to Warn*

The recent California and New Jersey cases imposing a duty to warn on psychiatrists rely primarily upon an extension of the "special relationships" doctrine.³⁹ The California court tried to buttress its imposition of a duty to warn potential victims by arguing that this duty will help protect the public from peril.⁴⁰ Neither of these approaches provides a satisfactory principled rationale for imposing upon psychiatrists a duty to warn potential victims.

There is no theoretical foundation to support the extension of the special relationships doctrine to psychiatrists. The courts have held that because of the psychiatrist's "special" relationship with the *patient*, he owes a duty to the *victim*, but they have not explained precisely what is "special" about the relationship that creates affirmative duties, or how the duty addresses the problem of the uncompensated servant. Instead, the courts have relied solely on analogous precedents to support their conclu-

38. In *Farwell v. Keaton*, 396 Mich. 281, 240 N.W.2d 217 (1976), for instance, the father of the decedent brought a wrongful death action against a young man who had been the decedent's social companion on the evening when the decedent received a fatal beating. The majority characterized the defendant's failure to obtain medical assistance or at least to notify someone as "shocking to humanitarian considerations," as such failures "fly in the face of 'the commonly accepted code of human conduct' ". The majority parenthetically noted that a "special relationship" existed between the parties, and without explaining what elements of that relationship resembled other "special" relationships, extended the doctrine to social companions.

Some cases speak at length about legal obligation in purely humanitarian terms, blur distinctions, and include the "special relationship" as an afterthought. See, e.g., *Hunicke v. Meramec Quarry Co.*, 262 Mo. 560, 172 S.W. 43 (1914).

The breadth of the relationships that have qualified for the apparently narrow designation of "special" may be seen in *Johnson v. State*, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968) (state-foster parent); *Vistica v. Presbyterian Hosp.*, 67 Cal. 2d 465, 432 P.2d 193, 62 Cal. Rptr. 577 (1967) (hospital-patient); *Ellis v. D'Angelo*, 116 Cal. App. 2d 310, 253 P.2d 675 (1953) (parent-babysitter); *Pirkle v. Oakdale Union Grammar School*, 116 Cal. App. 2d 140, 253 P.2d 1 (1953) (school-pupil); *Sparks v. Ober*, 192 So. 2d 81 (Fla. 1966) (tavern owner-business invitee); *Thomas v. Williams*, 105 Ga. App. 321, 124 S.E.2d 409 (1962) (jailor-prisoner); *Tubbs v. Argus*, 140 Ind. App. 695, 225 N.E.2d 841 (1967) (host-guest). According to Prosser, "there are undoubtedly other relationships calling for the same conclusion." W. PROSSER, *supra* note 24, at 342. Cf. *Caldwell v. Bechtel, Inc.*, 631 F.2d 989, 1000 (D.C. Cir. 1980) ("Courts have been eroding the general rule that there is no duty to act to help another in distress, by creating exceptions based upon a relationship between the actors.")

39. *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976); *McIntosh v. Milano*, 168 N.J. Super. Ct. 466, 403 A.2d 500 (1979). In *Mavroudis v. Superior Ct.*, 102 Cal. App. 3d 594 (1980), the court found *Tarasoff* controlling; the case will not be discussed here.

40. *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 440, 551 P.2d 334, 346, 131 Cal. Rptr. 14, 26 (1976).

sions.⁴¹ These precedents are of two kinds: the duty of a hospital to control its patients;⁴² and the duty of a doctor to protect third parties, usually from contagious disease.⁴³

However attractive the term "special relationship," the "special relationship" analysis is analytically vulnerable and lacks a principled basis for acceptance by other courts. First, simply pronouncing that the psychiatrist is involved in a "special relationship" does not even address the liberty principle, which argues against the imposition of affirmative duties.

Second, the judicial method applying the label of "special relationship," without articulating the components of the relationship that create affirmative duties, does not itself rise to the level of principled justification. As a result, it contributes to precisely the plummet down the slippery slope of prescribing affirmative duties that the intellectual tradition from Kant to current commentators has warned against.⁴⁴ To maintain the vitality of the liberty principle, the law must not create a catch-all exception that translates the personal moral preferences of judges into legal requirements.⁴⁵

Third, the "relationship" of a psychiatrist to his patient is one of confidentiality, and contends against, rather than for, a duty to warn potential victims.⁴⁶ In contrast, the psychiatrist normally does not have any "special relationship," nor in many cases even a personal acquaintance, with the

41. *Id.* at 436 nn. 7-8, 551 P.2d at 343-48 n.728, 131 Cal. Rptr. at 23-24 nn.7-8; *McIntosh v. Milano*, 168 N.J. Super. 466, at 489 n.20, 403 A.2d 500, 511-12 n.20, (1979). The California Supreme Court acknowledged that prior California decisions that had recognized a duty arising from special relationships involved fact situations in which the defendant stood in such a relationship both to the victim and to the person whose conduct created the danger, but asserted "we do not think that the duty should be logically constricted to such situations." *Tarasoff*, 17 Cal. 3d at 436 & nn.7-8, 551 P.2d at 344 & nn.7-8, 131 Cal. Rptr. at 23-4 & nn.7-8.

42. See *Underwood v. United States*, 356 F.2d 92 (5th Cir. 1966); *Fair v. United States*, 234 F.2d 288 (5th Cir. 1956); *Merchants Nat'l. Bank & Trust Co. v. United States*, 272 F. Supp. 409 (D.N.D. 1967); *Vistica v. Presbyterian Hosp.*, 432 P.2d 193, 62 Cal. Rptr. 577 (1967).

43. See *Davis v. Rodman*, 147 Ark. 385, 227 S.W. 612 (1921); *Skillings v. Allen*, 143 Minn. 323, 173 N.W. 663 (1919); *Wojcik v. Aluminum Co. of America*, 18 Misc. 2d 740, 183 N.Y.S.2d 351 (1959). Cf. *Hofman v. Blackmon*, 241 So.2d 752 (Fla. 1970) (duty to exercise reasonable care in diagnosing contagious disease); *Kaiser v. Suburban Transp. Sys.*, 65 Wash. 2d 461, 398 P.2d 14 (1965) (duty to warn patient that condition or medication renders certain conduct, such as driving car, dangerous).

44. See *supra* p. 1434.

45. See Scheid, *The Affirmative Duty to Act in Emergency Situations—The Return of the Good Samaritan*, 3 JOHN MAR. J. PRAC. & PROC. 1, 11 (1964). ("American Courts are obviously unhappy with the rule [the refusal to require rescue] and have attempted to circumvent it."); Harper & Kime, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 895 (1934) ("In a number of these cases, it seems apparent that the courts are struggling to find the appropriate basis of liability.")

46. "The confidences concerning individual or domestic life entrusted by a patient to a physician and the defects of disposition or flaws of character observed in patients during medical attendance should be held as a trust and should never be revealed *except when required by the laws of the state.*" AM. MED. ASS'N, PRINCIPLES OF MEDICAL ETHICS 3-4 (1978) (emphasis supplied). This concern for confidentiality does not represent a legal principle of sufficient breadth and weight to rebut a legal duty that might be based on independent grounds. See *infra* notes 52-53.

person who might be harmed by his patient.

In addition to the "special relationship" label, the California Supreme Court invoked the policy goal of protecting the "public interest in safety from violent assault"⁴⁷ to counter such arguments against the imposition of a duty to warn as the public interest in supporting effective treatment of mental illness, and the privacy rights of the patient.⁴⁸ The public safety argument faces conceptual problems similar to those of the "special relationships" doctrine. First, it does not explain why the liberty principle should be overcome in this category of cases. The goal of public safety presupposes that the maximization of net lives justifies the creation of a legal duty, regardless of the imposition on liberty. This policy justification alone, however, generally has not served to override the principle of individual liberty, as the case law well indicates.⁴⁹

Second, a duty to warn might well be counterproductive to attaining the policy goal of reducing violence. If a psychiatrist's duty to warn would either deter persons from seeking treatment or hinder treatment by discouraging full disclosure to the psychiatrist, then overall violent conduct may be increased and public safety may be endangered rather than protected.⁵⁰ Empirical research has been inconclusive;⁵¹ the public safety argument, like the "special relationship" label, may cut the other way and does not provide a sound justification for a duty to warn.⁵²

47. 17 Cal. 3d 425, 440, 551 P.2d 334, 346, 131 Cal. Rptr. 14, 26 (1976). New Jersey, on the other hand, recognizes that the mere realization that intervention is necessary for another's protection does not of itself impose a duty to so intervene. *McIntosh v. Milano*, 168 N.J. Super. 466, 483, 403 A.2d 500, 508-09 (1979).

48. 17 Cal. 3d 425, 440, 551 P.2d 334, 346, 131 Cal. Rptr. 14, 26 (1976).

49. See *supra* pp. 1433-35.

50. See *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 460-62, 551 P.2d 334, 360-61, 131 Cal. Rptr. 14, 40-41 (1976) (Clark, J., dissenting) [hereinafter referred to as the counterproductivity argument].

51. Proponents of the duty to warn have denied that the counterproductivity argument has any reliable statistical support and question whether it is even possible to establish such support. *McIntosh v. Milano*, 168 N.J. Super. 466, 496, 403 A.2d 500, 514 (1979). Further, these proponents point to anecdotal evidence—the rapid expansion of psychiatric practice in jurisdictions requiring psychiatrists to testify in court regarding the patient's mental condition, and the rapid expansion of group therapy in response to the counterproductivity argument. See Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma*, 62 CALIF. L. REV. 1025, 1043 (1974); Note, 6 SETON HALL L. REV. 536, 546 (1975).

Opponents of the duty to warn bolster their empirical argument with clinical or intuitive support. See Note, *Imposing a Duty to Warn on Psychiatrists—A Judicial Threat to the Psychiatric Profession*, 48 U. COLO. L. REV. 283, 293-95 (1977). They concede that psychiatry has flourished in jurisdictions that do not recognize a psychiatrist's testimonial privilege but suggest that it would have flourished even more had some patients not been deterred. See *id.* at 295.

The number of variables that might affect the use of psychiatry—income, age, occupation, region, changes over time—and the problems in obtaining accurate data create formidable barriers to obtaining statistical support for either side. Cf. E. TUFTS, *DATA ANALYSIS FOR POLITICS AND POLICY* 131-64 (1974) (multivariate analysis over time presents unique analytical problems).

52. A right to therapy might be derived from the entitlement of mental patients committed to state hospitals to receive effective therapy. See Note, *Imposing a Duty to Warn*, *supra* note 51, at 286-96. Courts advancing this entitlement have predicated it on two alternative theories: that mental patients

II. An Alternative Basis for Liability

The failure of the special relationships doctrine and public safety considerations to provide principled support for a psychiatrist's duty to protect a stranger's safety prompts two possible responses: a search for an alternative principle of liability, or the abandonment of the duty in favor of the liberty principle. A psychiatrist should be obligated to protect his patient's intended victim only if a valid principle can be found to justify imposition of the duty.

A. A Principle of Professional Obligation

An alternative "principle of professional obligation" can be derived from an analysis of the factors relevant to liberty: when a person enters an occupation in which he can reasonably expect to face an increased probability of discovering a helpless or endangered person, he is required to take steps to protect identified endangered persons.⁵³

As discussed above, the law's general refusal to allow the Good Samaritan principle to prevail is grounded on protection of liberty values typically associated with contract. The law has decided that these liberty values are safeguarded sufficiently in business relationships to require affirmative duties because the service-provider 1) has made a general choice about how to exercise his labor by entering a trade, 2) reasonably can foresee that other people will need particular forms of affirmative protection associated with the running of that business, and 3) can adjust his compensation to cover the costs (risks) of providing that protection.⁵⁴

committed to state hospitals that fail to provide effective therapy are subject to cruel and unusual punishment in violation of the Constitution, see, e.g., *People v. Feagley*, 14 Cal. 3d 338, 535 P.2d 373, 121 Cal. Rptr. 509 (1975); *People v. Wilkins*, 23 A.D.2d 178, 259 N.Y.S.2d 462 (1965), or that patients committed without therapy are therefore denied due process because they essentially are being criminally punished without a determination of criminal guilt, see, e.g., *Wyatt v. Stickney*, 325 F. Supp. 781, 785 (M.D. Ala. 1971), *aff'd sub. nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *Welsch v. Likins*, 373 F. Supp. 487, 499 (D. Minn. 1974); *Nason v. Superintendent of Bridgewater State Hosp.*, 353 Mass. 604, 233 N.E.2d 908 (1968).

This right to therapy cannot be extended to a psychiatrist's patient. Cases asserting a right to therapy have made it clear that the entitlement was only by the denial of liberty occasioned by commitment or imprisonment. See *Wyatt v. Stickney*, 325 F. Supp. 781, 784 (M.D. Ala. 1971), *aff'd sub. nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974). This denial of liberty is not present in the ordinary patient-psychiatrist relationship. Therefore, those raising the "interest in therapy" objection cannot demonstrate that the "interest" is a legally cognizable one. Cf. R. DWORKIN, *supra* note 4, at 15-130 (one can only demonstrate that an interest is legally cognizable by reference to other rules or principles).

53. To enunciate this particular principle of professional obligation is not to deny the existence of other legal principles. Therefore, in order to adopt concrete rights and duties applying to each profession, the law would need to account for the competing principles unique to each profession. For example, a valid rule applying to journalists would need to take First Amendment principles into consideration. A valid rule as applied to chemical researchers would consider the principles governing assignment of liability in a corporation.

54. See *supra* p. 1435.

These three liberty values are protected in imposing a duty to rescue on the psychiatrist. The psychiatrist chooses a profession that foreseeably increases the probability of his encountering endangered persons; he is paid;⁵⁵ and he can adjust his compensation to reflect additional risks or costs associated with his labor.⁵⁶ All the material and discrete analytical factors that apply in "contractual relationships" that justify affirmative duties apply as well in the psychiatric context. Therefore, based on the underlying Good Samaritan and liberty principles that operate to create duties to rescue in "business relationships," there exists a duty to protect the patient's intended victim.⁵⁷

B. *Advantages Over Special Relationships Doctrine and Public Safety Considerations*

The principle of professional obligation overcomes the analytical deficiencies of both the "special relationships" doctrine and the public safety arguments that courts have used to impose a duty to rescue on psychiatrists.

First, the principle clearly and directly addresses the liberty issue. The liberty arguments that are normally invoked to defeat the duty to warn apply here with only the faintest force. Unlike the "uncompensated servant," the psychiatrist could have avoided encountering the endangered

55. The logic of the business relationship and professional obligation principle cases does not require that the defendant receive payment from the particular plaintiff, but that he is paid for the business and profession in ways that allow him to distribute the costs of his risks of affirmative duties.

56. It might be objected that it is somehow unfair to shift some of the costs to prospective patients. Such an objection would not be a very potent one. Each patient would pay a "premium" for the risk he presents to a psychiatrist that he will threaten violence and that the psychiatrist will need to take affirmative steps. This premium will internalize the costs of the transaction, giving equal respect to the liberty of the psychiatrist and the liberty of the patient to strike a fair deal.

57. The concern for confidentiality represents a tenuous legal principle that accedes to a legal duty to the contrary. The professional code of ethics explicitly recognizes that confidences should not be revealed except when required by law. *See supra* note 46. The concern for confidentiality does not rebut a legal duty based on a valid rule or principle.

At common law, even in the absence of a legal duty to disclose, doctors have not been held liable for disclosure to advance a significant interest despite the patient's expectation of confidentiality. *See, e.g.,* Hague v. Williams, 37 N.J. 328, 181 A.2d 345 (1962) (physician informed insurance company of patient's heart trouble); Clark v. Geraci, 28 Misc. 2d 791, 208 N.Y.S.2d 564 (1960) (doctor informed patient's employer of patient's alcoholism); Berry v. Moench, 8 Utah 2d 191, 331 P.2d 814 (1958) (doctor informed parents of patient's fiancée that patient was manic-depressive).

Although it could also be argued that the constitutional right of privacy encompasses the right to have personal information kept secret, the Supreme Court has not yet extended the right of privacy that far. *See generally* Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U. L. REV. 670 (1973) (if "privacy" included right to keep personal information secret, it would be stretched to resemble substantive due process, which was discarded because it represented unstructured judicial fiat in determination of unenumerated rights). Rather, in its privacy decisions since *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court has recognized under the rubric of "privacy" the autonomous right to make personal choices such as that regarding abortion, *see Roe v. Wade*, 410 U.S. 113 (1973), and the right to be free from governmental intrusions in the home, *see Stanley v. Georgia*, 394 U.S. 557 (1969).

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person and can ensure that he is compensated for the increased risk of having to help such a person.⁵⁸

Second, the principle of professional obligation places a discernible limit on the extension of affirmative duties.⁵⁹ Unlike the open-ended public safety argument, which would seem to require affirmative duties whenever the most net lives could be saved, and unlike the malleable "special relationships" doctrine, this principle specifies three clear conditions that must be met in order for the duty to rescue to apply. Moreover, the professional obligation principle indicates that the party to whom the psychiatrist owes a duty is the patient's intended victim, whose peril is revealed as a result of a purposeful course of action undertaken by the psychiatrist. The "special relationship" of a doctor to his patient, on the other hand, suggests a cross-cutting, if limited, concern of confidentiality for that patient.⁶⁰

In contrast to the public safety argument, the professional obligation theory is based on a principled duty to an identified victim, not on empirical forecasts about some general impact on society as a whole. The principle is valid even if a duty to warn does not necessarily serve the policy

58. This principle might be criticized on the ground that, when first enunciated, it would apply to people who entered the profession before they were aware of this tort obligation. The liability imposed on those people might seem to be retroactive. Under a Dworkin analysis, though, those who were not aware of the tort obligations made the mistake of positivism in assuming that "law" consists only of explicit rules. Even when an explicit rule does not exist, principles govern. See *supra* note 11.

59. The "professional obligation" formulation more tightly cabins the affirmative duty than do other formulations that have been derived from contract analysis. See, e.g., Weinrib, *supra* note 18. This article argues that, if the point of refusing to require rescue is to affirm freedom of contract values, the helplessness of the victim undercuts (because of duress) the characteristics of a valid contract. In this sort of emergency, there are no liberty of contract values to be vindicated by the absence of a tort duty. *Id.* at 271-72. This analysis, however, cannot be applied to the fact situation of the patient's intended victim, because the victim is not under duress. The victim does not know that he has been threatened, but the psychiatrist does.

The more general problem with the Weinrib analysis, however, is that it does not successfully answer the slippery slope problem. See *supra* p. 1434. The article attempts to distinguish a rescue requirement from a wealth redistribution requirement in the following manner: "In the rescue context, the resource to be expended (time and effort directed at aiding the victim) cannot be traded on the market and no administrative scheme could be established to ensure the socially desirable level of benefits. In the charity context, by contrast, the resource to be expended (money) can be traded on the market, and an administrative scheme could be established not only to ensure the socially desirable level of benefits but to do so at a lower social cost than a judicially enforced duty in tort, or so the welfare state assumes." *Id.* at 272.

The first branch of this distinction is untenable. Time and effort (labor) can surely be traded on the market. People often plan the use of their time (with dates, appointments, meetings, schedules, etc.) and interrupting those plans with unexpected rescue attempts carries an economic cost; time is money.

The second branch does not clearly succeed either. It may well be that an administrative scheme (police, fire departments, rescue squads, public health clinics), because of superior skill and equipment, could do a more efficient job of saving lives than a general tort duty to rescue. There doesn't seem to be any *a priori* reason to assume that the welfare office does a better job than the rescue squad.

The principle of professional obligation, by contrast, more successfully delimits the affirmative duty and distinguishes the wealth redistribution (charity) context.

60. See *supra* note 57.

goal of reducing overall violence.⁶¹ This duty to an identified life is a critical feature; the law does not permit risking a predetermined, identifiable life in order to protect unidentified members of society, present or future, as a means of maximizing net lives. Once an individual life to whom a duty is owed has been identified, it is treated as "a pearl beyond price,"⁶² and that person's rights cannot be sacrificed for the overall maximization of life.⁶³

61. The public safety rationale justifies legal duties on the basis of saving the most net lives. In the area of criminal law, this position, which might be characterized as "life utilitarianism," has been explicitly rejected. The most renowned expression of this rejection is *R. v. Dudley & Stephens*, 14 Q.B.D. 273 (1884). In this case, four men had been adrift in an open boat. After seven days without food and five without water, two of the four decided that someone had to be sacrificed in order to save the others. They decided against drawing lots, but rather chose to put to death the youngest of the group. They were then rescued. The jury found that, if the men had not fed upon the boy, they probably would not have survived. Nonetheless, the Court found the two defendants guilty of murder.

62. See C. FRIED, *ANATOMY OF VALUES* 207-36 (1970); Calabresi, *Reflections on Medical Experimentation in Humans*, 98 DAEDALUS 378 (1969). According to Professor Calabresi, there is a deep conflict between the need to reaffirm our belief in the sanctity of life and the practical need to place some values above an individual life. Society tolerates the taking of life as long as the taking is not a blatant sacrifice of an identified individual, but rather indirect, such as the result of a market mechanism. *Id.* at 389. Taking a life is tolerable as long as society can create a sufficiently complex system for doing so, in order to obscure the taking and delude itself into believing that it still respects individual lives above all. *Id.* at 390.

Calabresi's rejection of a principled moral basis for refusing to risk the life of an identified individual is not convincing, because he does not convincingly rebut the moral arguments. He rejects the idea that actual consent represents a tenable distinction between the risks that are regulated by a reasonable care standard and those that are flatly prohibited (risks to identified lives), but it is not sufficient to reject that one point. As this Note discusses, actual consent is not the sole test of whether a rule has a principled moral basis. The issue is whether people in the initial position of constructing a just society would agree to a system distributing risks where no one is especially disadvantaged, that is, where each person gains the right to perform risky activities upon others in the pursuit of his own ends in exchange for granting others the right to do the same to him. See R. NOZICK, *supra* note 9, at 54-87. The procedure for determining the fairness of legal rules, not by establishing actual consent, but by discerning the principles that rational people would choose in initially designing a society, is well established. See J. RAWLS, *supra* note 9.

63. See *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972).

The principled justification for not sacrificing an identified life to whom a duty is owed in order to save future lives is explained by what is called the theory of a "risk pool." See C. FRIED, *ANATOMY OF VALUES* 183-200 (1970). All persons contribute to a common pool of risks that they may impose upon each other, and on which they may draw when pursuing ends of the appropriate degree of seriousness. See R. NOZICK, *supra* note 9, at 73-78.

According to the risk pool theory, principles of equity are violated when a specific individual is placed at risk in order to reduce the risks to other people in the community. The specific individual does not have an equal right to perform risky activities upon others in the pursuit of his own ends. Therefore, the law does not allow an identified predetermined individual life to be sacrificed or risked in order to reduce the risk to others, except in the most narrow circumstances: (1) when the individual consents, as in agreeing to medical experimentation or joining the fire department, or (2) when an accountable political process with broad participation (a legislature) determines the extraordinary necessity of violating the general risk-pool principle, and then does so by using a random method for identifying the individuals to be risked (such as a draft lottery).

The draft lottery can be distinguished in two ways from a tort rule that would allow individuals to risk the lives of identified victims. The first distinction lies in the nature of the political process deciding that an identified individual may be risked. The law does not permit an individual to decide that another person's life may be risked, because the risked person does not get any fair chance to be heard or to have his views expressed. The second distinction focuses on the extraordinary necessity that justifies a draft lottery—war or the threat of war. An exception is made to the "risk pool" concept

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Finally, the principle of professional obligation satisfactorily explains in a unified manner the affirmative obligations that have been imposed on professionals through a variety of existing rationales.⁶⁴ The professional obligation principle explains why a doctor is required to protect those who might be infected by his patient's disease.⁶⁵ Similarly, a lawyer is not protected by the attorney-client privilege from his obligation to disclose a client's intention to commit a future crime.⁶⁶ Also, child abuse statutes typically require professionals familiar with the abuse to take steps to protect the child.⁶⁷ The principle therefore exposes the underlying reasons for those duties, whatever the doctrine in which they may be clothed.

The principle of professional obligation therefore represents the most cogent and internally consistent synthesis of the legal principles that define both "liberty" and "liability" in this area. As such, the principle is law.

III. The Appropriate Threshold of Danger and Discharge of the Duty

The law's refusal to sanction risking the life of an identified person to whom a tort duty is owed has important implications for determining the appropriate standard of care for the psychiatrist.

A. Problems with Two Proposed Standards

To determine the level of probability at which a risk to a potential victim becomes "unreasonable," courts have historically weighed the gravity of the possible harm against the interests sacrificed by avoiding the risk.⁶⁸ When the gravity of possible harm is a threat to an identified life,

only when the very prerequisite of the pool, the social order allowing equal freedom to pursue one's own ends, itself is threatened.

A principled moral basis, therefore, explains the law's refusal to sacrifice an identified individual in order to advance the interests of society. The principle of professional obligation coincides with this moral basis and maintains a duty to warn regardless of whether such a duty saves the most net lives.

64. "If we were challenged to back up our claim that some principle is a principle of law, we would mention any prior cases in which the principle was cited, or figured in the argument. We would also mention any statute that seemed to exemplify the principle" R. DWORKIN, *supra* note 4, at 66.

65. See, e.g., *Wojcik v. Aluminum Co. of America*, 18 Misc. 2d 740, 183 N.Y.S.2d 351 (1959); *Davis v. Rodman*, 147 Ark. 385, 227 S.W. 612 (1921); *Skillings v. Allen*, 143 Minn. 323, 173 N.W. 663 (1919).

66. See *U.S. v. Mardian*, 546 F.2d 973 (D.C. Cir. 1976). The legal profession has clothed these affirmative obligations not in the "special relationships" rationale, but in an equally diaphanous rationale of professional obligation, the concept that the lawyer is "an officer of the Court." The present draft of the ABA Code of Professional Ethics requires a lawyer to "disclose information about the client to the extent necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or serious bodily injury to a person." MODEL CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT 25 (ABA Committee Draft 1981). In most jurisdictions, the ABA Code is adopted as rules of court and thus has the force of positive law.

67. See S. HALLECK, *LAW IN THE PRACTICE OF PSYCHIATRY* 186 (1980); Paulsen, *Child Abuse Reporting Laws: The Shape of the Legislation*, 67 COLUM. L. REV. 1 (1967).

68. See *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947), in which Learned

and a duty has been established to that life, the "pearl beyond price" evaluation of such a life⁶⁹ results in the risk being consistently deemed "unreasonable" even when the probability of injury to the victim is very small—perhaps even when the risk "only goes beyond the realm of everyday risks."⁷⁰ In order to remain faithful to the principles of tort law, alternative thresholds of danger should be assessed against this evaluation.

Two standards have been prominently advanced to trigger a psychiatrist's duty to warn. These are the psychiatrist's actual prediction,⁷¹ and utilization of the "standards of the profession" to determine whether the patient presented "a serious danger of violence to another."⁷² Each of these standards presents difficulties. The first standard presents a formidable problem of proof. It is difficult to determine whether a psychiatrist actually predicted that a patient would act on his threats without the psychiatrist's own incriminating testimony.⁷³ This standard also suffers from the use of the word "predict," which seems to imply that a psychiatrist should determine if the violence is more likely than not, which is too high a standard because it violates the tort principles that attach when a duty to an individual life has been established.⁷⁴

The alternative approach, which uses the standards of the profession to determine whether the patient presented "a serious danger of violence to another,"⁷⁵ avoids the formidable proof problems of actual prediction. It suffers, however, from the same problem of establishing a level of probability consistent with principles of tort law concerning the proper conduct when there is a risk to an identified life. It must therefore be tailored. The "standards of the profession" should be calibrated so that the duty to warn is triggered when the threat to life goes beyond the realm of frivolous or everyday risks, which is the threshold of danger that applies when a duty is owed to an individual life.⁷⁶

Hand expressed the formula as: "if the probability be called P, the injury L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether $B < PL$."

69. See *supra* p. 1442.

70. See C. FRIED, *supra* note 62, at 207-36.

71. *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal.3d 425, 551 P.2d 334, 353-54, 131 Cal. Rptr. 14, 33-34 (Mosk, J., concurring and dissenting).

72. *Id.*

73. Note, *Duty Imposed on Psychotherapists to Exercise Reasonable Care to Warn Potential Victims of Foreseeably Imminent Danger Posed by Mentally Ill Patients*, 6 SETON HALL L. REV. 536, 546 (1975).

74. See *supra* p. 1442.

75. See *supra* p. 1444 & n.71.

76. For general discussions of psychiatry's attempts to evaluate the likelihood of a patient's acting on threats, see S. HALLECK, *THE POLITICS OF THERAPY* 162 (1971); D. MECHANIC, *MENTAL HEALTH AND SOCIAL POLICY* 144 (1969); J. RAPPEPORT, *THE CLINICAL EVALUATION OF THE DANGEROUSNESS OF THE MENTALLY ILL* (1967); KOZOL, BOUCHER, & GAROFALO, *The Diagnosis and Treatment of Dangerousness*, 18 CRIME & DELINQ. 371, 384 (1972); MacDonald, *The Threat to Kill*, AM. J. PSYCH. 120, 125-30 (1963). Empirical evidence indicates that several hypothetical factors are not significantly related to the prediction of whether or not a patient will make good on his threat;

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B. *Discharge of the Duty*

Analysis of the principles underlying the “business relationship” cases also indicates how the duty to protect third parties should be discharged.⁷⁷ In order to be consistent with the liberty principle as expressed in “business relationship” affirmative duties, the professional must be able to cover the costs of the increased risk of encountering and having to assist endangered parties in the fees he normally receives for services.⁷⁸ As a practical matter, the psychiatrist generally would fulfill his duty by giving a timely warning to the potential victim.⁷⁹ If after receiving the warning the potential victim calls the police or initiates a commitment proceeding, as he may do in several jurisdictions, the psychiatrist should be required to corroborate the warning. If a reasonable person would not believe that the intended victim could protect himself adequately after a timely warning, such as by not associating with the patient, by locking doors, or by securing increased protection, the psychiatrist should be required to initiate emergency detention, if the jurisdiction allowed it,⁸⁰ or initiate civil commitment proceedings, if he believed the patient met the jurisdiction’s requisite standard of dangerousness for commitment.⁸¹

By acting in this manner, a psychiatrist will discharge his professional obligations in a manner prescribed by principled reasoning. He would behave according to a rule that explicitly takes into account the respective rights of the psychiatrist, patient, and victim, and not just a judge’s random idea of the greater social good.

these include parental brutality, parental seduction, childhood firesetting, cruelty to animals, enuresis to the age of five or beyond, alcoholism, and attempted suicide. J. MACDONALD, *HOMICIDAL THREATS* 21-73 (1968).

77. The *Tarasoff* case held that the therapist bore a duty to “exercise reasonable care to protect the foreseeable victim of that danger.” *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 439, 131 Cal. Rptr. 14, 22, 551 P.2d 334, 344 (1976).

78. See *supra* p. 1439. A psychiatrist could not reasonably be expected to “internalize” certain high-cost risks, such as endangering his own life.

79. In the *Tarasoff* and *McIntosh* cases, if the victims had not voluntarily associated with the killers, their lives would have been spared. See *supra* note 1.

80. This can only be done in certain jurisdictions. See S. HALLECK, *supra* note 76, at 119.

81. *Id.* at 140.